Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ALLEN H. SMITH,

Petitioner

v.

MARY JANE SMITH,

Respondent

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI

Allen H. Smith, Esq.
Pro Se

45 N Duke St

York PA 17401

717 854 6609

36 pp

QUESTION PRESENTED

Whether Pennsylvania's recusal standards for judges violate the Due Process Clause by permitting the judge to decide his own case, requiring actual prejudice, and allowing no immediate appeal?

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Villanova Law Rev., Vol 36, No. 3-4, p. 713 (1991)("Recusal Standards for Judges in Pennsylvania: Cause for Concern")----------4, App-26

OPINIONS BELOW

1. The Per Curiam Order of the Supreme Court of Pennsylvania, Middle District, No. 191 MD Misc. Dkt. 1998 denying the Petition for Allowance of Appeal. Dated 9/30/98.

2. The Order of the Superior Court of Pennsylvania, No. 378 Hbg 98, denying the Motion for Reconsideration. Dated 5/15/98.

3. The Order of the Superior Court of Pennsylvania Granting the Motion to Quash filed by respondent herein. Dated 4/21/98.

4. The Order of the Court of Common Pleas of York County, PA, No. 80 S 4440, denying the herein Petitioner's Motion for Recusal. Dated 3/2/98.

STATEMENT OF JURISDICTION

This Court has jurisdiciton of US Constitutional questions passed on or refused to be passed on by the highest state court, where properly raised below. 28 USC 1257 (a).

This Court has taken jurisdiction of collateral orders where petitioners would be subject to long and complex litigation which may be for naught if a preliminary question is not promptly resolved. Mercantile Ntl Bank v. Langdeau, 371 US 555 (1963).

CONSTITUTIONAL PROVISIONS

U.S. Const, amend XIV

> Nor shall any State deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

Your Petitioner filed a Motion for Recusal with the trial judge citing twenty-two reasons for his recusal. The trial judge, without hearing, without assignment to another judge, without argument, without opinion, without making of a record, refused to recuse himself.

Petitioner appealed to the Superior Court of Penna. Respondent opposed the the appeal as interlocutory. The Superior Court quashed the appeal. It denied reconsideration. The Supreme Court of Pennsylvania refused to hear the case.

REASONS FOR GRANTING THE WRIT

1. Pennsylvania's standards for recusal of judges violate the Due Process Clause of the U.S. Constitution.

2. Pennsylvania permits a judge to rule on his own recusal, and there is no appeal from that until the end of the case.

3. In this case, there was no process at all. The judge denied the Motion in a single sentence, without referral to another judge, and without hearing, and without record.

4. Pennsylvania's recusal standards have been cause for comment. See Villanova Law Review, Vol. 36, No. 3-4, p. 713

(1991) ("Recusal Standards for Judges in Pennsylvania: Cause for Concern")

CONCLUSION

The Court should issue a writ of certiorari to the Superior Court of Pennsylvania.

Respectfully submitted,

Allen H. Smith, Esq.
45 N Duke St
York PA 17401
(pro se)
717 854 6609

IN THE SUPREME COURT OF

PENNSYLVANIA

MARY JANE SMITH,

Respondent

V.

ALLEN H. SMITH,

Petitioner

No. 176 MD Misc
Dkt 1998

ORDER

PER CURIAM:

AND NOW, this 30th day of September, 1998, the request to direct petitioner to refrain from filing any further interlocutory appeals and the Petition for Allowance of Appeal are denied.

TRUE AND CORRECT COPY

ATTEST: October 1, 1998

JOAN L. STEHULAK, ESQUIRE

DEPUTY PROTHONOTARY

IN THE SUPERIOR COURT OF

PENNSYLVANIA

MARY JANE SMITH NO. 378 Hbg 98

V.

ALLEN H. SMITH,

Appellant

ALLEN H. SMITH

V.

HONORABLE OSCAR SPICER

MARY JANE SMITH Middle District

1998

ORDER OF COURT

The Court hereby DENIES the motion for reconsideration filed at No. 378 Harrisburg 1998.

The Court hereby DISMISSES AS MOOT the petition for writ of mandamus filed at No. 20 Miscellaneous Docket Middle District 1998.

PER CURIAM

DATE: May 15, 1998

IN THE SUPERIOR COURT OF

PENNSYLVANIA

MARY JANE SMITH No. 378 Hbg 98

V.

ALLEN H. SMITH,

Appellant

ORDER OF COURT

The Court hereby GRANTS the motion to quash.

The Court hereby DENIED the request for counsel fees.

PER CURIAM

DATE: APRIL 21, 1998

TRUE COPY FROM RECORD

ATTEST: April 22, 1998

Patricia A. Whittaker

Chief Clerk

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

MARY JANE SMITH, Plaintiff
V.
ALLEN H SMITH. Defendant

No. 80 S 4440

ORDER OF COURT

AND NOW, this 2nd day of March, 1998, defendant's Motion for Recusal is denied.

BY THE COURT:

OSCAR F. SPICER
President Judge
51st District
Specially Presiding

cc: Rees Griffiths, Esq.
Leo Gribbin, Esq.

OFS/pr

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

MARY JANE SMITH, Plaintiff

V.

ALLEN H. SMITH, Defendant

No. 80 S 4440

Divorce-Equitable Distribution

PETITION FOR RECUSAL

TO THE HONORABLE, Oscar Spicer, Jr., specially presiding:

1.

Petitioner is Allen H. Smith of 45 North Duke Street, York, Pennsylvania.

2.

Since on or about Oct. 28, 1987, the Honorable Oscar Spicer, Jr., has been presiding over the above captioned matter.

3.

Canon 3.C. of the Code of Judicial Conduct provides that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where he has a personal bias or prejudice concerning a party.

4.

Judicial conduct is governed by the precept of avoiding not only actual impropriety but even the appearance of impropriety. Com v. Bryant, 328 Pa. Super. 1, 476 A.2d 422 (1985); See Municipal publications, Inc. v. Court of Common Pleas of Philadelphia County, 513 Pa. 163, 489 A.2d 1286 (1985).

5.

The bases for the request for recusal follow:

A. The Master who was appointed by Judge Spicer, did not award counsel fees for wife because he determined that wife was on a par with husband in protecting her rights, and that neither party has established that one or the other was responsible for delay in pursuing litigation. (Master's Report, p. 68, 69)

The Court in its Opinion filed July 23, 1994 found no basis for reversing the findings of the Master that each party bears responsibility for the considerable delay in this case, nevertheless assessed $18,047.91 against your Petitioner for Attorney's fees and expenses of Plaintiff's counsel based on allegedly frivolous appeals. Yet, as of July 23, 1994, only ONE appeal had been sent back to the lower court for the imposition

of costs. The Court deemed improperly, that every appeal of Petitioner that was deemed interlocutory was per se frivolous.

B. Again, on September 23, 1997, the Court awared $14,000.00 additional fees for such "frivolous

appeals." From and after July 23, 1994, only ONE appeal was sent back to the lower court for the imposition of counsel fees.

C. The Order of the additional $14,000.00 in counsel fees was entered in violation of the rules of evidence, procedure and due process. In awarding the $14,000.00 in additional counsel fees, the Court did so without the benefit of sworn testimony as to the fairness and reasonableness of the services rendered, without any testimony that there was a contract between counsel seeking the award and his client, and without the admission into evidence of the document which purported to support the claim for fees and expenses. The allowance of this amount without opportunity

for cross-examination and objection to its use was arbitrary and wholly unsupported by evidence.

D. The Court found your Petitioner in contempt of court for non-payment of counsel fees and expenses in the amount of $17,047.91 without making appropriate findings and without evidence that your Petitioner intentionally did not pay it and that your Petitioner had the wherewithal to pay it.

E. During the course of the proceedings in the above-captioned matter, your Petitioner exercised his privilege against possible self-incrimination. This is a right guaranteed by both the Federal and Commonwealth of Pennsylvania Constitutions. The Court apparently

has become antagnostic to your Petitioner because of the exercise of that Constitutional privilege.

In his opinion of July 23, 1994, the Court charges your Petitioner with "compounding problems" by invoking his privilege against self-incrimination after the IRS audited his tax returns and filed a $750,000 tax lien. "His cooperation in resolving issues of equitable distribution has never been salutary and silence has exacerbated what has never been a good situation." In that same Opinion, the Court wrote: "Generally, defendant's role in these proceedings has been one of passive truculence. He has declined to divulge information citing an ongoing investigation into

tax fraud." (p. 3)

F. The Court, with no knowledge of the facts and with no foundation, concludes that the tax liens against your Petitioner indicate that the defendant has grossly under-reported income. (Opinion of July 23, 1994, p. 4)

G. Because of these large tax liens the Court illogically concluded that because your Petitioner had large tax liens, that Defendant was a very successful lawyer, and by implication, a man of substance.

H. The Court apparently has made all sorts of unfortunate inferences about the background, character, reputation of your Petitioner be-

cause of the existence of large tax liens and the exercise of the privilege against possible self-incrimination.

Let the record reflect that your Petitioner served with the 81st infantry Division during World War II in invasions of Anguar, Peleliu, and inthe campaign in Leyte, served again as an Infantry Officer during the Korean Emergency, was a former Deputy Attorney General with the Commonwealth of Pennsylvania, is a certified teacher in the Commonwealth of Pennsylvania, having taught Senior High School English in excess of four years, taught courses at York College, and Penn State University, York Campus, was a leader of Great Books Classes for many years, was elected

twice by the voters of York County as Recorder of Deeds and has practiced law for approximately 37 years.

I. Counsel for the Plaintiff on September 23, 1997 was permitted to make a completely false representation to the Court as to the content of a Petition filed by your Petitioner, with impunity.

J. Counsel for the Defendant on September 23, 1997 with regard to the sale of stock was met with the following: "I think it is incumbent upon you as an officer of this Court to provide us with a report of how that transaction occurred." (Tr. p. 5) Further the Court said to Defendant's

"...with your representation that you arranged the sale, I think it's incumbent upon you to explain just exactly what happened." (Id, p. 53). And further: "If that's what you(re) representing that's one thing. If you're not sure what happened, then I think you better reconstruct what happened and file a report with me." (Id.)

K. An atmosphere of menace and terror pervades the Courtroom in proceedings before the Honorable Oscar Spicer, Jr. That which is set forth in "J" supra is one illustration. Another standing out in bolder relief occurred during the hearing of September 23, 1997. At that time the Court stated in reference to a subpoena which was to be ser-

ved upon a representative of PNC Bank: " I would strongly suggest that you serve this on somebody locally that we can put in jail."

L. The Court has permitted counsel for the Plaintiff to use a procedure that is apparently unparalleled in the history of Pleadings. Petitions which allege facts may be filed without requiring affidavits of the Petitioner. (See New Matter filed in Response to Petition for Termination of Alimony Pendente Lite, filed July 30, 1997; also Petition for Rule to Show Cause why Allen H. Smith should not be held in contempt of court filed July 30, 1997; and Amended Petition for Contempt filed January 23, 1998)

The Court has permitted Plaintiff's counsel fo file New Matter to Exceptions that were filed by the Defendant. (See "response and New Matter to Defendant's Exceptions" (sic) filed October 24, 1997.

The Court has permitted counsel for the Plaintiff to bring piecemeal Petitions for Special Relief ad infinitum.

M. The Court has permitted Counsel for the Plaintiff, Beverly J. Points, Esq., to write to it, without admonishment, as follows: "Thank you very much for your consideration in this matter. Please feel free to contact me or Rees Griffiths if you have any questions

or wish to discuss this matter."

N. The existence of tax liens against the Defendant was brought to the attention of the Master in the Equitable Distribution Hearing. With full knowledge that these liens attach to real, personal and intangible property owned by the Defendant at the time of the Master's Hearing, the Court nevertheless awarded all real estate, all stock, and most life insurance policies of the Defendant to the Plaintiff in complete disregard of these liens and their priority. The Court in its opinion filed July 23, 1994 indicates that it has no idea what position the Internal Revenue Service will take with regard to

clearing title to the real estate. Nothing was held in escrow to protect the Internal Revenue Service. In the Court's 1925 Opinion of May 24, 1996, the Court indicates that IRS liens against the Defendant have no right to be paid out of the proceeds of the sale of marital stock. In that opinion, the Court determined that Defendant has no shares in or of the stock. Yet, the IRS lien was of record long before the stock was awarded to Plaintiff.

O. Very early in the proceedings in 80 S 4440, Defendant entered an appearance as co-counsel in the case. The Court in a conference call of Feb. 3, 1998 indicated at the next Hearing that he would pro-

bably enter an Order that the Defendant no longer would have the option to proceed "pro se" but would have to proceed through counsel or by himself, but not both. If such a ruling was to be made the Defendant's Sixth Amendment right to counsel would be violated or his right to represent himself would be violated.

P. The Court sent out a notice of a Heairng to be held in August 1997. The notice was sent to the York County Prothonotary, but not to counsel or the parties. The only way Defendant learned of the Hearing date was by inspecting the file for another purpose.

Q. The 1925 Opinion written by the

Court on May 24, 1996 was not forwarded to either Defendant or his counsel or Defendant as pro-se counsel. The Opinion was "faxed" to Attorney Tony Sangiamo who had no involvement in the Appeal and did not and does not represent the Defendant.

R. The Order of Court of September 23, 1997, which held the Defendant in Contempt and imposed certain mandates on counsel for the Defendant, was not filed by the Court until October 3, 1997. When Defendant called the Court Reporter inquiring about non-receipt of the Order, she advised that the Order was typed on September 25, 1997, but it was not filed because the Judge was "circulating it."

S. In the Court's decree of July 25, 1994, the Court said "the case is referred back to the master so that the scheme of distribution may be expeditiously accomplished." No further involvement of the Master has occurred since the filing of his Report.

T. No indication has even been made by Judge Spicer as to whether York County Local Rules or Adams County Local Rules apply in the instant case. As a result, a loose procedure has been used by the Plaintiff's counsel which results in calls to and from the Court Administrator and the Court. The proceedings have degererated to the point where as indicated in "M", supra, Plaintiff's counsel actually invited

the Court to "Please feel free to contact me or Rees Griffiths if you have any questions or wish to discuss the matter."

U. The Defendant filed an Appeal to the Superior Court of Pennsylvania from the Order of Court of September 23, 1997.
Defendant ordered a copy of the transcript of the Hearing and served Judge Spicer's Court Reporter with the Order for transcript on Oct. 22, 1997, by first class U.S. Mail. An acknowledgment of the direction to file a transcript was made by the Court reporter by her letter of Oct. 27, 1997. Defendant sent the Court Reporter the requested check in the amount of $175.00. Although Rule of Ap-

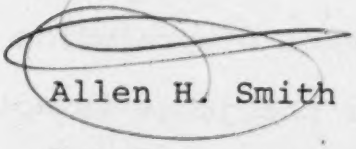
pellate Procedure 1922a requires that the reporter shall transcribe the notes fourteen days after receipt of the Order and payment, Defendant had to file an action in Mandamus on Dec. 15, 1997 against the Court Reporter of Judge Spicer.

V. Although stock was sold and monies placed in escrow for use by the Master, pursuant to Order of Court of April 1, 1996, the Master has never been given any further duties.

5. Under the circumstances, the Honorable Oscar Spicer, Jr. should disqualify and recuse himself from this case to comply with the Code of Judicial Conduct and to avoid even the appearance of impropriety.

WHEREFORE, Petitioner requests that the Honorable Oscar Spicer, Jr. disqualify and recuse himself from this case. Alternately, Petitioner requests a full hearing of this Petition before another Judge on the issue of disqualification.

Respectfully submitted,



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Date: February 23, 1998

EXCERPT FROM

VILLANOVA LAW REVIEW

VOLUME 36 AUGUST 1991 NUMBER 3-4

PAGE 713

Two changes in judicial recusal standards for Pennsylvania are suggested by a look at the laws of other jurisdictions: first whenever feasible, a judge other than the one whose recusal is sought ought to decide a recusal petition; and second, the appropriate standard for recusal is the appearance of prejudice or impropriety, not whether the judge is actually biased or has abused his discretion in declining to recuse himself. Recusal should be required whenever a judge's impartiality might reasonably be questioned. In cases where the challenged judge is willing to grant the recusal motion, referral should not be necessary. Otherwise. the decisionmaker should not be the judge whose recusal is sought. Although the Code of Judicial Conduct does not suggest

that the decision to recuse should be referred to another judge, doing so may help reinstill or maintain the confidence of litigants and the public's perception that state judges are impartial.